

**U.S. Department of Labor**

Office of Administrative Law Judges  
St. Tammany Courthouse Annex  
428 E. Boston Street, 1<sup>st</sup> Floor  
Covington, LA 70433-2846

(985) 809-5173  
(985) 893-7351 (Fax)



**Issue Date: 15 July 2009**

**CASE NO.: 2008-LHC-01915**

**OWCP NO.: 06-130518**

**In the Matter of:**

**M.G.,  
Claimant**

**v.**

**DOLPHIN SERVICES, L.L.C.,  
Employer**

**and**

**GULF SOUTH RISK SERVICES,<sup>1</sup>  
Carrier**

**APPEARANCES:  
TONY B. JOBE, ESQ.  
On behalf of Claimant**

**WILLIAM BORDELON, ESQ.  
On behalf of Employer/Carrier**

**BEFORE: LARRY W. PRICE  
Administrative Law Judge**

**DECISION AND ORDER DENYING BENEFITS**

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by Claimant against Dolphin Services, L.L.C., (Employer).

The issues raised by the Parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. A formal hearing was held in

---

<sup>1</sup> Employer's Counsel informed the Court at the hearing that Gulf South Risk Services is a third-party administrator and that Employer is self-insured. [Tr. p. 6-7].

Covington, Louisiana, on March 6, 2009. All Parties were afforded a full opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs. The following exhibits were received into evidence:

1. Claimant's Exhibits (CX) 1 – 12, 16, 18<sup>2</sup>
2. Employer's Exhibits (EX) 1 – 16<sup>3</sup>

### **SUMMARY**

Claimant brought this claim for compensation alleging an injury to his back occurring on November 9, 2007 while working for Employer offshore as a rigger. According to Claimant, he woke up with back pain on November 10, 2007, reported his injury, and filled out an accident report with a supervisor. Claimant continued to work until November 19, 2007, at which time he returned home for the Thanksgiving holidays. Claimant returned offshore and continued working in his same position as a rigger without complication. Claimant returned home for the Christmas holidays and saw a family physician for a rash on his face, but did not report any back pain at that time. Claimant returned to work for Employer in its yard in January of 2008, but his employment was terminated shortly thereafter after reporting to work with alcohol in his system. Claimant was eventually seen in the emergency room in March of 2008 for back and neck pain. Employer denies Claimant was injured while working offshore in November of 2007.

### **FINDINGS OF FACT**

#### **Testimony of Claimant**

Claimant testified at the formal hearing and by deposition on December 16, 2008. [Tr. p. 87; CX 1]. Claimant worked for Employer from September of 2007 until January of 2008. [Tr. p. 88; CX 1, p. 7]. Claimant testified that he was injured on the first date he returned offshore, November 9, 2007, while working for Employer as a rigger. [Tr. p. 90; CX 1, p. 17, 24]. Claimant was working on the top deck with Mr. Steve Higginbotham and Mr. Grant Bonvillian, moving and hanging/lifting pipes and valves. [Tr. p. 90, 102; CX 1, p. 17, 110]. Mr. Randall Almarez, the crane operator, was also working with Claimant on the rig at this time. [CX 1, p. 20]. According to Claimant, he felt pain in his back when he woke up on November 10, 2007. [Tr. p. 126; CX 1, p. 11-12]. Claimant testified that he told Mr. Higginbotham that his back was hurting and that Mr. Higginbotham informed Mr. Thad Hopkins, a supervisor. [Tr. p. 92-93, 125; CX 1, p. 15]. However, Claimant also testified at his deposition that he informed both Mr. Higginbotham and Mr. Hopkins that he was injured. [CX 1, p. 60, 62]. Claimant testified that Mr. Hopkins went upstairs to the "birdhouse" and told Mr. Harold Parks, also a supervisor, that Claimant was injured. According to Claimant, Mr. Hopkins then informed Claimant that he

---

<sup>2</sup> The record was left open to allow possibly as many as five post-hearing depositions, including that of Mr. Randall Almarez, and Claimant's earnings from 2006 and 2007. [Tr. p. 12-13, 313-314]. Claimant's Counsel submitted the deposition of Mr. Almarez, Mr. Harold Parks, Jr., and Mr. Thad Hopkins, along with Claimant's tax return and earning statements, and a letter from Dr. Jonathan Shults post-hearing, which are hereby admitted.

<sup>3</sup> EX 5 was admitted for purposes of cross-examination only. [Tr. p. 15]. EX 13 was admitted for the purpose of having the first date of injury that Claimant claimed. [Tr. p. 15-16].

needed to go upstairs to fill out an accident report, however, Claimant testified that he did not see or hear Mr. Hopkins tell Mr. Parks that he had been injured. [Tr. p. 126; CX 1, p. 11, 63, 65].

According to Claimant, Mr. Parks started filling out an accident report, but then handed it to him to complete and began talking to Mr. Hopkins. Claimant testified that the only part not filled out on the report was the description because he was not sure how the injury occurred, if it was while moving pipes or valves. [Tr. p. 130; CX 1, p. 10]. Claimant testified that both he and Mr. Parks signed the accident report. [Tr. p. 129; CX 1, p. 69, 110]. Claimant testified at his deposition that other than Mr. Parks, he is not sure if anyone else witnessed the signing of the accident report. [CX 1, p. 71]. At the formal hearing, however, Claimant testified that besides Mr. Parks, Mr. Hopkins, Mr. Benny Hudson and Mr. Vinnie Wynn were present in the birdhouse when he filled out the accident report. [Tr. p. 127-128]. According to Claimant, the birdhouse is a twenty by twenty open room with no partitions. [Tr. p. 127].

Claimant testified that Mr. Parks stated he would fax the accident report to Employer's main office. [Tr. p. 90, 129; CX 1, p. 70, 110]. Claimant testified that Mr. Parks told him to go back to work until he heard something from Employer's office. [Tr. p. 91; CX 1, p. 110]. Claimant testified that he understood the procedure for reporting accidents and that at the time of his injury, the person he would have reported his accident to was Mr. Hopkins, who would then report it to Mr. Parks. [CX 1, p. 9-10]. When asked why he did not seek medical care right after the accident, Claimant testified that he did what Mr. Parks told him to do, which was to go back to work, although Claimant did acknowledge that there was a medic available. [Tr. p. 90, 94-95, 131; CX 1, p. 109]. Claimant testified that he later asked Mr. Parks if he had heard anything from the office about whether or not he was being sent in and that Mr. Parks informed him that he had not. [Tr. p. 90].

Claimant continued to work anywhere between twelve to sixteen hours a day while offshore. [Tr. p. 135]. Specifically, Claimant worked fourteen hours on November 10, 2007, fifteen hours on November 11, 12, 13, 14, and 15, 2007, sixteen hours on November 16, 2007, fifteen hours on November 17 and 18, 2007, and twelve hours on November 19, 2007. [Tr. p. 47-48, 135; EX 3]. Claimant testified that although he continued to work, Mr. Higginbotham and Mr. Adam Rodrigue would help him out with his job. [Tr. p. 133-134]. Claimant testified that while his job required repetitive bending, stooping, and lifting, between November 10 through 19, 2007, he mostly did the "hooking up" when he could, and that other workers would help "hook up" for him because they saw that he was unable to do everything that he would normally have to do as a rigger. [Tr. p. 136-137]. Claimant testified that once his back pain began on November 10, 2007, it continued to hurt the rest of the period offshore, whether he was working or not. [CX 1, p. 96]. Claimant described his pain during this period only as stiffness and burning in his lower back. [CX 1, p. 99].

When asked about who knew Claimant was in pain, Claimant testified that besides Mr. Higginbotham, Mr. Hopkins, and Mr. Parks, Mr. Almarez, the crane operator, knew because they talked about his back, he saw Claimant working "crunched" over, and he heard Claimant ask Mr. Parks whether he would be sent in or not. [Tr. p. 92, 94; CX 1, p. 91]. Claimant also said a few other guys, including Mr. Shane Lilley, who did not testify, heard Claimant ask Mr. Parks about

whether he would be sent in or not, and that Mr. Lilley also saw Claimant working “hunched” over. [Tr. p. 92; CX 1, p. 97].

Claimant returned home for the Thanksgiving holidays on November 19, 2007, but testified that he did not seek medical attention at that time because the pain was subsiding. [Tr. p. 94-95, 120]. Claimant testified that he was aware that he had health insurance available and that the hospital in Houma, Louisiana, was a charity hospital. [Tr. p. 139].

Claimant returned offshore on November 26, 2007 until December 19, 2007. [Tr. p. 120]. Claimant testified that he continued working because the pain had subsided and that he no longer worked hunched over during this period because the tension was “easing up,” even though he was working twelve to eighteen hours a day as a rigger as he had been previously. [Tr. p. 140, 143-144; CX 1, p. 97-98]. Claimant testified that during this period people would give him a hand while he was working, but that he never complained to anyone that he was unable to do his job during this period. [Tr. p. 140]. Claimant testified that following his injury in November of 2007 he had stiffness in his back plus pain, whereas in December of 2007 he only felt stiffness in his back with mild pain. [Tr. p. 145].

On December 28, 2007, Claimant was seen by Dr. Bruce Guidry, M.D., his family physician, for a rash on his face. [CX 10]. Claimant testified that the rash was caused by poison oak or poison ivy. [Tr. p. 96; CX 1, p. 105; CX 10]. However, Claimant later testified that he was taking Bayer Aspirin for numbness in his arms and legs, which in turn caused little sores on his scalp, leading him to see Dr. Guidry. [Tr. p. 114-115]. Claimant testified that he did not complain of numbness in his legs to Dr. Guidry. [Tr. p. 115-116]. However, Claimant also testified that he was having numbness in December of 2007 and that to the best of his knowledge, he informed Dr. Guidry that he was having numbness at this time. [Tr. p. 117-120, 153]. When asked to clarify exactly what he told Dr. Guidry, Claimant testified that Dr. Guidry “asked me when he seen the sores on my scalp what I’d been take, what I’d been doing, and I told him I’d been taking, uh, Bayer Tylenol and stuff like that because I thought my blood was thick, that I was getting some numbness in my arms, and leg.” [Tr. p. 116]. However, at his deposition, Claimant testified that the numbness in his right arm and leg started getting worse at the end of February 2008, and that he could not recall any numbness prior to this date. [Tr. p. 118-119; CX 1, p. 99-100, 111-112]. Claimant testified that he did not bring up his back pain to Dr. Guidry because it was pain that he could handle. [Tr. p. 96, 116].

Claimant returned to work for Employer in the yard from January 2, 2008 until January 17, 2008, at which time he was fired for having alcohol in his system while at work. [Tr. p. 97-98, 121, 153; CX 1, p. 72]. Claimant testified that he would drink to ease some of his back pain. [Tr. p. 98-99]. While in the yard, Claimant worked in a bathroom laying ceramic tiles with Mr. Billy Fletcher. [Tr. p. 121, 148]. Claimant testified that he only dragged or carried a few of the boxes the ceramic tiles came in. [Tr. p. 150-151]. Claimant testified that while working in the yard he only felt mild burning in his lower back. [CX 1, p. 98].

Claimant testified that since his employment with Employer terminated, he has spoken with Mr. Higginbotham, who he stated remembered reporting to Mr. Hopkins that Claimant was

injured. [CX 1, p. 14-15]. Claimant also testified that he has spoken with Mr. Lilley, Mr. Hopkins, and Mr. Almarez about his accident and/or present claim. [CX 1, p. 22, 91].

Claimant testified that he did try to seek employment with a company called Preferred Sandblasting, L.L.C., in February of 2008. [Tr. p. 99, 101, 156]. According to Claimant, he met with a man about employment and was told to come back and speak with someone else before being hired. However, Claimant testified that before he went back, the pain became excruciating and he could not return. [Tr. p. 99-100, 157]. However, Claimant also testified that he was not hired because he informed the man that he had been injured on the job. [Tr. p. 100-101]. A letter dated August 13, 2008, signed by Mr. Chris Dubois, Manager with Preferred Sandblasting, L.L.C., confirms that Claimant did apply in the early part of the year, but was not hired. The letter does not clarify Claimant's testimony about why he was not hired. [EX 14e; EX 15]. Claimant testified that he sought employment with two other companies, but they were not hiring. [Tr. p. 101]. Claimant testified on cross-examination and at his deposition that after January 17, 2008, when he was no longer working for Employer, his back pain started getting worse even though he was not doing any strenuous activity and had not suffered any physical injury that could have caused his pain to worsen. [Tr. p. 99, 154-156; CX 1, p. 54, 104]. At the formal hearing, Claimant described his pain as steady burning in the middle of his back. [Tr. p. 111-112].

Claimant testified that his back pain started getting worse and on March 11, 2008, he was seen in the emergency room for neck and back pain. [Tr. p. 101; EX 9]. The clinical history states Claimant was hurt while lifting heavy objects offshore about two months ago. An examination showed Claimant had sciatica. [EX 9]. An image of Claimant's lumbar spine showed degenerative changes, but was otherwise normal. An image of Claimant's cervical spine showed degenerative changes most pronounced at C5-6, and was otherwise normal. [CX 9; CX 11; CX 12; EX 9]. Claimant was discharged and told to follow up with his family physician in three days. [EX 9]. Claimant testified that he mentioned he was injured between October and December of 2007 while lifting and moving pipes and valves offshore as a rigger. [Tr. p. 102].

Claimant testified that he always attributed the pain he felt on November 10, 2007, to the injury he felt on his first day offshore on November 9, 2007. [Tr. p. 121-122]. When asked to clarify his LS-203 signed by him and dated March 12, 2008, listing December 6, 2007 as the date of injury, Claimant testified that he informed his prior attorney that his injury was between October and December of 2007, and that his attorney wrote that date. [Tr. p. 122, 162-164; CX 1, p. 35-36; EX 2a]. Claimant's second LS-203, signed by him and dated April 23, 2008, lists October of 2007 as the date of injury. [Tr. p. 171-172; EX 2b]. Claimant testified that although he signed it, he informed his current Counsel that the date of injury was between October and December of 2007. [Tr. p. 172-173; CX 1, p. 76]. Claimant signed a third LS-203 on that same date, but this time the date of injury is listed as December 7, 2007. [Tr. p. 173; EX 2c]. Claimant signed his fourth and final LS-203 on July 23, 2008, and listed the date of injury as November 9, 2007. [Tr. p. 176; CX 1, p. 82-84; EX 2d]. Claimant testified that he was able to eventually remember the date of his injury with the help of his documents and his co-workers, specifically Mr. Hopkins. [Tr. p. 103-104; CX 1, p. 85]. At his deposition Claimant testified that both Mr. Hopkins and one other person helped him remember the date of his injury. According to Claimant, Mr. Hopkins did not state the exact date, but did tell him he remembered

Claimant being injured on the first hitch they worked together, which was November 9, 2007. [CX 1, p. 85].

Dr. Shults also has Claimant's date of injury as December 7, 2007. However, Claimant testified that he did not recall providing him with a date and that he stated he was injured between October and December of 2007. [Tr. p. 167-168; EX 6]. Claimant further testified that he did not provide Dr. Charlet with the December 7, 2007, date of injury that he too has noted in his record. [Tr. p. 166; EX 7]. Claimant did not know at what point in time he figured out the approximate date of the accident, but did note that Dr. Shults' February 4, 2009, record states Claimant began experiencing neck and back pain on November 10, 2007. [Tr. p. 182; CX 5; EX 6].

### **Testimony of Claimant's Wife**

Claimant's wife testified at the formal hearing that she learned of Claimant's injury when he called her on November 10, 2007. [Tr. p. 57-58, 70]. She further testified that they spoke daily between November 10, 2007 and November 19, 2007, and that Claimant informed her that he had filled out an accident report and was waiting to hear from Employer as to when he was to be flown in. [Tr. p. 59-60, 71].

Claimant's wife testified that when Claimant returned home, she knew he was hurting by his own admission and by observing the way he was standing. [Tr. p. 61]. She further testified that Claimant informed her that he thought it might have been "a real bad pulled muscle" and that Claimant did not go see a physician because he thought it was probably a pulled muscle. [Tr. p. 61, 77-78]. She testified that they realized it was more than a pulled muscle in January of 2008, when Claimant's hands and legs were starting to go numb. [Tr. p. 62].

After Claimant's employment terminated in January of 2008, Claimant's wife testified that she recalled him seeking employment at one business, but that he did not get the job because of his back. [Tr. p. 62-64]. She further testified that Claimant had time to go to a doctor after he was fired by Employer. [Tr. p. 83].

### **Testimony and Medical Records of Dr. Jonathan M. Shults, M.D.**

Dr. Jonathan M. Shults, M.D., a board certified orthopedic surgeon, testified at the formal hearing. Dr. Shults first saw Claimant on May 27, 2008. [Tr. p. 107, 189; CX 5; EX 6]. Dr. Shults testified, and his medical report notes, that Claimant stated he was installing pipes and valves on December 7, 2007, and woke up the next day with pain in his back and neck, but denied any specific injuries. [Tr. p. 189; CX 5; EX 6]. Dr. Shults testified that although Claimant came into his office with a posture consistent with that of a severely injured individual, his examination showed normal reflexes, normal strength, and normal sensation. [Tr. p. 190]. Dr. Shults recommended an MRI of Claimant's lumbar and cervical spine, but noted that Claimant stated he previously had a surgical wire placed in an eye socket and therefore could not have an MRI. [Tr. p. 110, 209; CX 5; EX 6]. A CT scan was ordered instead and Claimant was placed on anti-inflammatory and anti-spasmodic medications. [Tr. p. 110; CX 5; EX 6]. The impression from the CT scan of Claimant's cervical and lumbar spine that same day noted a

significant right posterior disc osteophyte complex at C5-6 that could have a mass effect on the exiting right ventral C6 nerve root and a mild right neural foraminal narrowing from uncovertebral joint arthrosis at C3-4. [CX 5; CX 6; EX 8]. Dr. Shults testified that the CT scan impression was “a lot of doctor words saying its arthritis.” [Tr. p. 230].

Claimant returned to Dr. Shults on May 29, 2008. Dr. Shults noted that there were no metallic objects within Claimant’s cranium as previously stated and he could have therefore had an MRI. [Tr. p. 191; CX 5; EX 6]. A review of the diagnostic studies found:

CT scan of his cervical spine notes him to have disc space narrowing at C5-6 w/ a disc protrusion measuring about 4x7mm, pushing on the right C6 nerve root; otherwise, the other levels are w/o any significant problems other than some arthrosis.

Evaluation of his lumbar notes him to have some disc space narrowing at all levels w/ some arthrosis at L4-5. He has a protruded disc, again pushing on the right lateral recess, hitting the right L5 nerve root.

Dr. Shults further noted that he discussed with Claimant at length the fact that what he complained about did not “equal up” with the physical examination and the CT scan. [Tr. p 192; CX 5; EX 6]. Given that Claimant had complaints that Dr. Shults could not explain, an EMG and physical therapy were recommended. [Tr. p. 193; CX 5; EX 6]. Dr. Shults testified that he did not order an MRI because at that point, an additional imaging of the spine would not have produced any more information. [Tr. p. 210, 242]. Dr. Shults did, however, agree that an MRI “would not be a bad idea.” [Tr. p. 247]. Dr. Shults testified that physical therapy would no longer be of benefit to Claimant. [Tr. p. 244-245]. Claimant met with Dr. Michael Charlet, M.D., on June 20, 2008, for an EMG. [CX 5; EX 7].

Claimant returned to Dr. Shults’ office on June 27, 2008. Dr. Shults reviewed the results of the EMG and Dr. Charlet’s opinion, and opined that those findings do not cause the symptomology on the examination that Claimant presented. Dr. Shults continued: “The correlation of the EMG along w/ the . . . [CT scan] of the right L5 nerve root does concern me; however[,] his stated symptomology does not point to this as being his chief complaint.” [Tr. p. 234; CX 5; EX 6]. Asked to explain this finding, Dr. Shults testified:

[Claimant’s] complaints, um, with the non-invasive testing of CT scans, showing protrusions both on the right side, which could be symptomatic; the EMG sort of went away from that also, stating that these are not symptomatic lesions that we’re seeing in his cervical spine, number one. And his lumbar spine is an older injury, and even these two small disc herniations couldn’t produce the diffuse symptoms that . . . [Claimant] was complaining of. [Tr. p. 194].

Dr. Shults concluded that at that point, he could not explain what was causing Claimant’s problems, based on physical examination or other non-invasive tests. Claimant was given a sedentary work release, with a maximum ten pound lifting restriction and limited

standing/walking. [CX 5; EX 6]. Claimant testified that Dr. Shults informed him that he had two ruptured discs in his back and two in his neck. [Tr. p. 108].

Claimant saw Dr. Shults for an independent medical examination at Employer's request on February 4, 2009. [Tr. p. 194; CX 5; EX 6]. At this time, the date noted as when Claimant began to experience back and neck pain was November 10, 2007. [Tr. p. 195; CX 5; EX 6]. Claimant's chief complaints were back pain, bilateral leg pain, resolving neck pain, and bilateral arm numbness. [Tr. p. 194; CX 5; EX 6].

Dr. Shults could not find any evidence, either in Claimant's history or on physical examination, that he suffered any acute injury, noting that he had not shown any signs of an acute lumbar injury such as muscle spasm or muscle guarding to explain his marked decrease range of motion. Dr. Shults continued that Claimant had non-verifiable radicular nerve root pain, meaning his complaints of upper and lower extremity numbness and pain have no identifiable origin. Claimant's sensory and motor complaints were found not to follow an anatomic distribution and were not consistent with the affected nerve structures. [CX 5; EX 6]. He also opined that Claimant did not demonstrate any atrophy. [Tr. p. 198; CX 5; EX 6].

Dr. Shults testified that Claimant's complaints of bilateral arm numbness, causing his entire arm to go numb, could not be explained by any single injury or problem within the central or peripheral nervous system since it would have to involve several different nerves at the same time. Dr. Shults opined that this would be indicative of Claimant "faking it." [Tr. p. 196-197].

Dr. Shults testified that Claimant informed him on this date that he was not doing anything, essentially only moving from the couch to another area of the house at times. However, Dr. Shults testified that Claimant's tan and scratches on his hand made him question Claimant's statement that he sat inside or on the front porch all day. [Tr. p. 197-198].

Dr. Shults opined that Claimant demonstrated signs and symptoms of abnormal illness behavior. [CX 5; EX 6]. Dr. Shults testified that there are tests that can be done on patients for non-organic signs of symptom magnification, called Waddell signs. [Tr. p. 199-201]. Dr. Shults concluded that Claimant had four out of five Waddell signs present, which he opined was highly suggestive of overt behavior and non-organic pain response. [Tr. p. 199; CX 5; EX 6].

Claimant testified that Dr. Shults informed him on this date that he was going to have to have surgery to remove two discs. [Tr. p. 107].

### **Medical Record of Dr. Michael Charlet**

Claimant met with Dr. Michael Charlet, M.D., on June 20, 2008, for an EMG. [Tr. p. 193; CX 5; CX 7; EX 7]. Dr. Charlet's report notes that Claimant "describes a work-related accident on 12/7/07 with continued pain involving his lower back as well as his neck which radiate[s] down bilateral legs, worse on the right . . . [and] bilateral hand pain and numbness." The EMG revealed evidence of a mild chronic partial right L5 radiculopathy and moderate right and mild left carpal tunnel syndrome, but no significant evidence of cervical radiculopathy. [CX 5; CX 7; EX 7].

### **Testimony of Steve Higginbotham**

Mr. Steve Higginbotham, who Claimant testified had knowledge of Claimant's injury, testified at the formal hearing that he and Claimant worked together for Employer in November of 2007. [Tr. p. 277-278]. According to Mr. Higginbotham, he never saw an accident involving Claimant and stated that Claimant never reported to him in November of 2007 that his back was hurt. [Tr. p. 278, 280]. He further testified that between November 10 and 19, 2007, he never witnessed Claimant having any difficulty performing his job. Mr. Higginbotham testified that he never brought Claimant to Mr. Hopkins and was not present when an accident report was allegedly filled out in the birdhouse. [Tr. p. 278, 280].

Mr. Higginbotham testified that prior to the formal hearing Claimant's Counsel contacted him and asked if he remembered Claimant, which he stated he did not until seeing Claimant at the formal hearing. [Tr. p. 278-279].

### **Testimony of Thad Hopkins**

Mr. Thad Hopkins, who works for Employer as a supervisor, testified by deposition on February 16, 2009, and at the formal hearing. [Tr. p. 20; CX 2]. Mr. Hopkins knows Claimant from working with him offshore from November 9, 2007 through November 19, 2007. [Tr. p. 20-21, 26-27, 47]. As a supervisor over Claimant, Mr. Hopkins testified that he would give Claimant instructions on what to do, although he never observed him working. [Tr. p. 22-24]. Mr. Hopkins' immediate supervisor was Mr. Harold Parks. [Tr. p. 29].

Mr. Hopkins testified that Claimant informed him that his back was hurting on November 10, 2007. [Tr. p. 28, 42, 46; CX 2, p. 10-11, 23-24]. Mr. Hopkins testified that neither Mr. Higginbotham nor Mr. Almarez were present when Claimant informed him that his back was hurting. [Tr. p. 42]. Mr. Hopkins testified at the formal hearing that he informed Mr. Parks about Claimant's injury when he was going to get Claimant some Tylenol, although at his deposition he testified that he was unsure whether or not he brought Claimant's injury to Mr. Parks' attention. [Tr. p. 30, 43; CX 2, p. 13, 23-24]. In a statement given August 6, 2008, Mr. Hopkins stated that he did take Claimant to see Mr. Parks. [CX 2, Exhibit 1, p. 13-14].

As for his recollection of an accident report: In his statement made on August 6, 2008, Mr. Hopkins was ambiguous on whether or not he saw an accident report; at his deposition he testified that he did not remember seeing an accident report; and at the formal hearing he testified that he did not see an accident report. [Tr. p. 32, 43; CX 2, p. 11-13, 16, Exhibit 1, p. 13-14]. However, Mr. Hopkins did testify that he recalled Mr. Parks stating that an accident report needed to be filled out. [Tr. p. 30, 45-46; CX 2, p. 12-13, 24]. Mr. Hopkins testified that the procedure would have been to fill out an accident report that would have been faxed in to the main office by Mr. Parks, but that he did not know whether Mr. Parks had in fact faxed one in. [Tr. p. 37; CX 2, p. 15].

Mr. Hopkins testified that he did not recall Claimant showing signs of injury between November 10, 2007 and November 19, 2007, and that following their initial conversation,

Claimant did not thereafter complain to him about his back hurting, ask for help getting Employer's approval to be flown in, or ask to go to the medic. [Tr. p. 36-37, 48-49].

Mr. Hopkins later observed Claimant working in the yard in January of 2008, when Claimant was laying tiles in the bathroom. [Tr. p. 40]. Mr. Hopkins testified that he was not sure whether that job involved heavy lifting or not, but that Claimant's ability to work was "normal" and that he did not notice him walking "bent over." [Tr. p. 41].

### **Testimony of Harold J. Parks, Jr.**

Mr. Harold J. Parks, Jr., testified by deposition on December 16, 2008, and at the formal hearing. Mr. Parks was working for Employer offshore as a supervisor in November of 2007. According to Mr. Parks, he does not remember Claimant or anyone else ever reporting an accident to him on November 10, 2007. [Tr. p. 283, 285-286, 295; Parks Depo., p. 6-7]. Mr. Parks testified that Claimant never came to the birdhouse to fill out an accident report. [Tr. p. 284]. Mr. Parks also testified that Claimant never asked to be sent in on that date through November 14, 2007, at which time Mr. Parks was no longer offshore. [Tr. p. 283, 285-286, 295]. Mr. Parks testified that accidents on the platform are normally memorable events. [Tr. p. 297-298]. He further testified that a medic was available and that he never informed Claimant to go back to work instead of seeing a medic. [Tr. p. 283-284, 286]. Mr. Parks testified that during the period he was offshore with Claimant, Claimant never showed any signs of injury while working on the platform. [Tr. p. 285-286].

Mr. Parks testified that he would be the proper person for Claimant to have reported an accident to, and that the policy, as a supervisor, for someone claiming to have hurt their back would have been to fill out an accident report and send the injured employee to the medic. [Tr. p. 283-284, 287, 293; Parks Depo., p. 29-30]. Mr. Parks testified that an accident report was never filled out concerning any injury Claimant may have suffered since an accident was never reported to him. [Tr. p. 283-284, 287, 293]. Mr. Parks further testified that he only signs the accident report, and that the injured employee fills it out. [Parks Depo., p. 30]. Once it is filled out, Mr. Parks testified that he would then fax the report and make a phone call to either Employer's yard or one of four other gentlemen, including the offshore manager, assistant offshore manager, or offshore coordinator. [Parks Depo., p. 30-33]. A copy of the report would also go to the medic, OIM, and Mr. Hudson. [Parks Depo., p. 35-37, Exhibit B].

### **Testimony of Randall B. Almarez**

Mr. Randall B. Almarez, who Claimant testified was aware of his injury, testified by deposition taken post-hearing on March 17, 2009. Mr. Almarez testified that he was working for Employer as a crane operator on the same rig as Claimant in November of 2007. [Almarez Depo., p. 7-8]. Mr. Almarez testified that Claimant mentioned he was hurting, but did not provide any detail about exactly what happened and he did not witness an accident involving Claimant. [Almarez Depo., p. 9, 12, 17, 23, 35, 46]. However, Mr. Almarez testified that Claimant did inform him at a later date that he was injured tripping on something. [Almarez Depo., p. 35]. Mr. Almarez testified that he recalls Claimant mentioning he was hurting on November 9, 2007, but that was the only time they really discussed it and that he never

recommended Claimant go see a medic. [Alvarez Depo., p. 18-19, 25, 27]. He further testified that Claimant worked well at all times they worked together in November and December of 2007. [Alvarez Depo., p. 57].

Mr. Alvarez had previously provided Claimant's Counsel with a non-dated, hand written statement signed by him and reading as follows:

[O]n or about November 9, 2007, a witness a conversation between . . . [Claimant] and supervisor Harold Parks, Thad Hopkins and several other employees, that . . . [Claimant] had a[n] accident, and they were filling out a report and I asked Mr. Parks what happen[ed] and what was gonna be done at this point, and he stated he was gonna have to send the report to the safety office after I noticed and asked . . . [Claimant] how bad was he feeling and he said it was hurting him but he would try to work it out. [Alvarez Depo., p. 10-11, Exhibit 2; CX 19].

Mr. Alvarez, could not remember the exact date he wrote this statement, but did recall it was sometime in 2008. [Alvarez Depo., p. 43, 53]. Contrary to the above statement, Mr. Alvarez testified that Mr. Parks informed him that Claimant had hurt himself and that an accident report was probably going to have to be filled out, but he did not know whether one was ever filled out and was never told by Mr. Parks that one was definitely going to be sent in. [Alvarez Depo., p. 10, 13, 17, 30, 47]. Mr. Alvarez testified that he witnessed this conversation in the "smoke break" area of the platform, but was not certain if Mr. Hopkins and others were present. [Alvarez Depo., p. 10]. In addition, Mr. Alvarez testified that he witnessed "people" doing "some paperwork," but could not state whether it was an accident report or not and could not definitively say whether this was in November or December of 2007, [Alvarez Depo., p. 13-14, 37-38, 40], but later testified that the conversation was witnessed either November 7, 8, or 9, 2007. [Alvarez Depo., p. 54]. Although he could not recall who exactly was filling out what paperwork, he did testify that he saw Claimant, Mr. Parks, Mr. Hopkins, and Mr. Lilley at the table, but not Mr. Hudson. [Alvarez Depo., p. 39-40, 57-58].

Mr. Alvarez was also present at Claimant's informal conference on July 17, 2008. [Alvarez Depo., p. 44; EX 16]. At the informal conference, Mr. Alvarez reported that he was willing to testify that he witnessed Claimant completing an accident report at the location just minutes after the accident occurred, despite his testimony to the contrary. [Alvarez Depo., p. 9, 12, 17, 23, 35, 46; EX 16]. The date of injury stated on the memorandum of informal conference is December 7, 2007. [EX 16]. Mr. Alvarez testified he could not remember if he informed Claimant or his counsel that the date of the accident was on this date. [Alvarez Depo., p. 44, 47-48].

Mr. Alvarez attributed his lack of recollection for many statements throughout his deposition to either intoxication or to "wet brain syndrome" caused by his alcoholism. [Alvarez Depo., p. 16, 25, 28, 38, 43, 49, 53, 55].

### **Testimony of Adam J. Rodrigue**

Mr. Adam J. Rodrigue, who Claimant testified helped him at times while working offshore following his injury, testified at the formal hearing that he worked with Claimant in November of 2007 as a fitter for Employer. [Tr. p. 265-266]. Mr. Rodrigue testified that Claimant was in his view for a “good bit off and on” while working and that Claimant did not show any signs of injury. [Tr. p. 266-267, 273, 276]. He further testified that he did not see an accident involving Claimant. [Tr. p. 267]. Mr. Rodrigue testified that Claimant would move around the platform normally and that he never heard Claimant complain that he could not do his job. [Tr. p. 268].

Mr. Rodrigue testified that during the Thanksgiving holidays in 2007, he, Claimant, and Claimant’s son, went deer hunting, and that Claimant did not complain to him or show any signs of injury that day, although they were not together at every moment of the hunt. [Tr. p. 269, 271]. Mr. Rodrigue described the terrain as wooded, uneven land. [Tr. p. 275]. Claimant testified that he did not recall going deer hunting over the Thanksgiving holidays in 2007. [Tr. p. 179].

Mr. Rodrigue testified that Claimant called him in the summer of 2008 and asked if he remembered Claimant being hurt. According to Mr. Rodrigue, he informed Claimant that he did not remember him being hurt. Mr. Rodrigue testified that this was the first time Claimant ever told him he had an accident. [Tr. p. 267, 274].

#### **Testimony of Mr. Benny Hudson**

Mr. Benny Hudson, who Claimant testified was present in the birdhouse when he filled out an accident report, testified by deposition following the formal hearing. Mr. Hudson testified that he had an office in the “birdhouse” on the platform. [Hudson Depo., p. 5-6]. Since the birdhouse is a twenty by twenty open room, Mr. Hudson testified that there would be no way for Claimant to speak about and fill out an accident report in the birdhouse with Mr. Parks without him hearing the conversation. [Hudson Depo., p. 5-7]. If, however, an accident report was filled out in the smoke-break area, Mr. Hudson testified that he would not have been able to hear or see such interaction. [Hudson Depo., p. 10]. Mr. Hudson testified that he could not remember Claimant ever expressing to him that he was hurt. [Hudson Depo., p. 8]. He further testified that the first time he learned that Claimant was claiming to have been injured in November of 2007 was sometime in 2008. [Hudson Depo., p. 15].

Mr. Hudson testified to the following procedure for filling out an accident report: “I would have to get a copy of the accident report, and also if anybody was hurt, they would have to go see the medic that’s there on the platform. Medic would fill out an Anadarko report, and I would get a little short form of that report from Anadarko. I would have to fill out an accident report myself from RCI Consultants and all three of those would have to be sent into Anadarko and RCI Consultants.” [Hudson Depo., p. 7-8]. Mr. Hudson further testified that had Mr. Parks filled out an accident report, he would have definitely notified him. [Hudson Depo., p. 14].

#### **Testimony of Tyrone Lewis**

Mr. Tyrone Lewis testified at the formal hearing that he worked side by side with Claimant for Employer as a rigger from December 14 through December 19, 2007. [Tr. p. 307-309]. Mr. Lewis testified that during that period of time, Claimant never showed any signs of pain, never complained about being hurt, and never informed him that he had been injured while working for Employer. [Tr. p. 308]. He further testified that he had never heard of an accident involving Claimant. [Tr. p. 308-309].

### **Testimony of Billy Ray Fletcher**

Mr. Billy Ray Fletcher testified at the formal hearing that he worked side by side with Claimant on Employer's bathroom from January 2 until January 17, 2008. [Tr. p. 300-301]. Mr. Fletcher testified that they worked together between twelve to fourteen hours a day putting in the bathroom tiles. [Tr. p. 302-303].

Mr. Fletcher estimated that the boxes containing the floor tiles weighed between fifty to sixty pounds and that the boxes containing the wall tiles weighed between thirty to forty pounds. Mr. Fletcher testified that they would have to lift the boxes to bring them into the bathroom about twice a day and that Claimant showed no sign of pain when doing so. [Tr. p. 301, 305-306]. Mr. Fletcher testified that during the time he worked with Claimant he never reported or showed any signs of pain. [Tr. p. 302]. He further testified that Claimant never informed him that he had been hurt while working for Employer offshore. [Tr. p. 303].

Mr. Fletcher testified that following Claimant's termination, they spoke a few times about Claimant possibly going to work for another employer that does offshore carpentry work and that Claimant never told him about any physical difficulties that may restrict him from doing that job. [Tr. p. 303-304].

### **Testimony of Joseph Hutchinson, IV**

Mr. Joseph Hutchinson, IV, testified at the formal hearing that he was working for Employer in the shop or the yard for half of a day in January of 2008. [Tr. p. 262-263]. Mr. Hutchinson testified that he did not see Claimant working, but would see him in the break room during breaks. [Tr. p. 263-264]. Mr. Hutchinson testified that, to his knowledge, Claimant did not complain of any physical problems to him personally and that he was not aware of Claimant informing other employees that he had hurt himself in November of 2007. [Tr. p. 261, 264].

### **Testimony of Christina Hutchinson**

Mrs. Christina Hutchinson, wife of Mr. Joseph Hutchinson, IV, testified to a conversation she heard take place between Claimant and a mutual friend, Mr. David Trahan, Senior, who did not testify at the formal hearing. According to Mrs. Hutchinson, she walked up on a conversation between the two men wherein Claimant stated that he had been in a car accident, received a DWI, hurt his back, and was pinning it on Employer. [Tr. p. 254]. Mrs. Hutchinson testified that when her husband later mentioned that Claimant was suing Employer for an offshore injury, she informed him of the conversation she overheard, stating she thought

Claimant was injured in a car accident. [Tr. p. 255]. Mrs. Hutchinson testified that she did not overhear any dates as to when this car accident occurred, and that she overheard the conversation more than four months ago, but less than a year ago. [Tr. p. 256-257].

Claimant testified that he never made the above statement and has not been in a car accident since November of 2007. [Tr. p. 177-178, 184].

## DISCUSSION

In arriving at a decision in this matter, it is well-settled that the fact-finder is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. Todd Shipyards v. Donovan, 200 F.2d 741 (5th Cir. 1962); Banks v. Chi. Grain Trimmers Ass'n, 390 U.S. 459, 467, reh'g denied, 391 U.S. 928 (1968). It has been consistently held that the Act must be construed liberally in favor of the claimants. Voris v. Eikel, 346 U.S. 328, 333 (1953); J.B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the “true-doubt” rule, which resolves factual doubt in favor of the claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. § 556(d). The APA specifies the proponent of the rule or position has the burden of proof. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), aff'g 990 F.2d 730 (3d Cir. 1993).

### *The Compensable Injury*

Section 20(a) of the Act provides the claimant with a presumption that his claim comes within the provisions of the Act. However, before an administrative law judge may properly apply the Section 20(a) presumption, the claimant must establish a prima facie case by proving that he suffered some harm or pain, and that an accident occurred or working conditions existed which could have caused the harm. Murphy v. SCA/Shayne Bros., 7 BRBS 309 (1977). It is the claimant's burden to establish each element of his prima facie case by affirmative proof. See Kooley v. Marine Indus. Nw., 22 BRBS 142 (1989). The claimant does not need to affirmatively establish a connection between the work and the harm. Rather, he need only establish that (1) he suffered a physical injury or harm and (2) working conditions existed or a work accident occurred which could have caused, aggravated or accelerated the injury. See Gencarelle v. Gen. Dynamics Corp., 22 BRBS 170, 174 (1989), aff'd, 892 F.2d 173 (2d Cir. 1989). Furthermore, the injury need not be the sole cause or primary factor in a disability for compensation purposes. If the employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. Strachan Shipping v. Nash, 782 F.2d 513 (5th Cir. 1986).

Considering first whether there is sufficient evidence that Claimant was injured, it is noted that a claimant's credible complaints of subjective symptoms and pain can be sufficient to establish that an injury occurred. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd, 681 F.2d 359 (5th Cir. 1982). However, for reasons elaborated upon below, I find that Claimant's credibility is suspect therefore making his testimony alone insufficient to establish the first element of his prima facie case. I also find that the credible medical evidence

and testimony of Dr. Shults do not substantiate his claim that an injury occurred. Claimant did not mention any work-related back injury to Dr. Guidry in December of 2007. [Tr. p. 96, 116; CX 10]. At Dr. Shults first appointment with Claimant, he noted that Claimant's physical examination showed normal reflexes, strength, and sensation. [Tr. p. 190]. Dr. Shults ordered a CT scan which he testified showed Claimant suffered from arthritis and reaffirmed that what Claimant complained of did not equal up with the physical examination and CT scan. [Tr. p. 192 230; CX 5; EX 6]. Dr. Shults then ordered an EMG, and after reviewing the EMG and Dr. Charlet's opinion, opined that the findings did not cause the symptoms presented by Claimant. There is no indication from any of the medical evidence and testimony of Dr. Shults that Claimant was injured while working offshore, other than Claimant's subjective reporting of his symptoms and not upon any objective findings and therefore is not persuasive. In addition, I do not find that the testimony of Claimant's wife regarding Claimant's injury to be persuasive, as she formed her opinion, in part, on Claimant's subjective complaints. Therefore, there is no medical evidence or credible testimony to support a finding that Claimant sustained an injury under the Act and Claimant's testimony alone is insufficient to establish the first element of his prima facie case.

Even assuming, arguendo, that Claimant could show he sustained an injury, Claimant has not shown that circumstances at work existed or an accident occurred which could have caused his disability. Claimant must prove that the alleged accident did in fact occur. Kelaita v. Triple A Machine Shop, 13 BRBS 326, 330-31 (1981). There must be a finding of some work-related accident, exposure, event, or episode. Luna v. Gen. Dynamics Corp., 12 BRBS 511, 513 (1980). The Section 20(a) presumption which operates to link the harm to the accident does not apply to a determination of whether an accident occurred. Mock v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 166 (1981), aff'd 687 F.2d 34 (4th Cir. 1982).

As the alleged accident in this case was unwitnessed, a finding that an accident in fact occurred must be predicated upon the credible testimony of Claimant. The determination of credibility rests exclusively with the trier of fact who is not required to believe even Claimant's uncontradicted testimony if it is reasonable to conclude from the record as a whole that Claimant did not tell the truth. Sharp v. Marine Corps Exchange, 11 BRBS 197, 200 (1979).

In view of the extensive evidence presented to contradict Claimant's testimony, as well as Claimant's own self-contradicting statements, I find that Claimant's credibility has been impeached and, as a result, his testimony is insufficient to establish the second element of his prima facie case. A brief discussion of the most significant discrepancies follows.

There are several variations as to the date of Claimant's alleged accident and injury. His current claim alleges November 9, 2007 as the date of the accident and injury. [Claimant's Brief, p. 1]. However, Claimant's first three LS-203's, signed by him, list December 6, 2007, October 2007, and December 7, 2007, respectively. It was not until his fourth LS-203, dated and signed July 23, 2008, that Claimant has November 9, 2007 as the date of injury. The first medical records of Dr. Shults and Dr. Charlet have the date of injury as December 7, 2007. The emergency room notes of March 11, 2008, state Claimant was hurt while working offshore about two months ago. Claimant testified that he informed his prior and current Counsel, the attending doctor in the emergency room, and Dr. Shults that he was injured between October and

December of 2007. [Tr. p. 102, 122, 162-164, 167-168; 172-173]. However, I find it difficult to believe that Claimant's Counsel and physicians would make up a completely random date if Claimant stated such a broad time frame for his injury. Furthermore, Claimant testified that he has always attributed the pain he felt on November 10, 2007, to the injury he had on his first day offshore. [Tr. p. 121-122].

Claimant's description of events immediately following the alleged accident is not only confusing, but internally inconsistent and contradictory to his own statements and those of others he claims to have talked to about his injury. Claimant testified at the hearing that he informed Mr. Higginbotham that his back was hurting, and that Mr. Higginbotham informed Mr. Hopkins, but at his deposition he testified that he informed Mr. Hopkins that he was injured. In either event, Mr. Higginbotham credibly testified that he never saw an accident involving Claimant, was never told by Claimant that he was hurt, and never brought Claimant to see Mr. Hopkins. Although Mr. Hopkins testified that Claimant informed him that his back was hurting, his testimony regarding whether he informed Mr. Parks of Claimant's injury and whether he saw an accident report was equivocal and therefore I give that portion of his testimony less weight.

Claimant testified that he then went upstairs to the birdhouse, met with Mr. Parks, and signed an accident report. Claimant testified that Mr. Parks, Mr. Hopkins, Mr. Hudson, and Mr. Wynn were present in the birdhouse when he filled out the accident report. [Tr. p. 127-128]. However, Mr. Parks credibly testified that Claimant never came to the birdhouse to fill out an accident report. As noted above, Mr. Hopkins testimony was equivocal on whether or not he saw an accident report, and is therefore given less weight. Mr. Hudson credibly testified that if he was in the birdhouse, as Claimant alleged, when an accident report was discussed and completed, he would have known. It should also be noted that Claimant's Counsel claims that "Mr. Almarez saw . . . [Claimant], Mr. Hopkins, and Mr. Parks sitting at a picnic table in the birdhouse filling out papers, which he believed to be an accident report." [Claimant's Brief, p. 3]. Mr. Almarez, however, testified that what he witnessed was at a picnic table in the smoke break area, not the birdhouse. Moreover, nothing in Claimant's testimony suggests that the accident report was filled out anywhere other than the birdhouse. Thus, what Mr. Almarez witnessed in the smoke break area is of no consequence as it could not have been an accident report.

There was also no testimony to support Claimant's statement that others witnessed him working in pain following the accident and helped him with his job duties. Quite the contrary, Mr. Higginbotham, Mr. Hopkins, Mr. Almarez, and Mr. Rodrigue all testified that they did not notice Claimant having any difficulty working. In addition, Mr. Rodrigue credibly testified that he and Claimant went hunting over the Thanksgiving holidays, shortly after Claimant's alleged injury.

Even more telling is Claimant's ability to continue working offshore in November, return to work in December of 2007 without difficulty, and again in January of 2008 in Employer's yard, claiming all the while that the pain was subsiding and "easing up," but yet allege that after his employment was terminated, and denying any strenuous activity, his back pain became excruciating. In addition, although Claimant admitted he could continue to work because the pain had subsided, he was fired for having alcohol in his system while at work, which he claimed

was done to ease his pain. I find Claimant's testimony that he had to drink to ease his pain contrary to his testimony that he did not seek medical attention because the pain was subsiding, especially given the fact that at all times following the alleged injury Claimant could have seen a medic for back pain while offshore or while home during the holidays. In sum, Claimant's actions are as nonsensical as his testimony.

Claimant's testimony and his claim stretch credulity beyond rational logic. In view of the internal and external inconsistencies and contradictions evident in Claimant's testimony and considering the pertinent testimony of the witnesses and medical evidence of record, I find and conclude that Claimant failed to demonstrate he suffered a work-related accident resulting in an injury to his back in November of 2007, and thus has not established a prima facie case that he is entitled to the Section 20(a) presumption under the Act. Since Claimant is not entitled to compensation under the Act, all other issues are moot.

### **ORDER**

Based upon the foregoing findings of fact, conclusions of law, and upon the entire record, Claimant's claim for benefits under the Act is hereby **DENIED**.

**So ORDERED.**

**A**

**LARRY W. PRICE  
ADMINISTRATIVE LAW JUDGE**